IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 778 of 2005

WITH

CIVIL APPLICATION NO. 917 of 2005

Bharat Apartment Co-op Housing
Society Limited .. Appellant

versus

Bharathamurthy Jagannathan & ors. .. Respondents

...

Mr.Shailesh Shah with Mr.Prakash Kulkarni i/b M/s.Zohair & Co. for the appellant.

Mr.G.S. Godbole with Mr.A.R. Bamne for respondent nos.1 to 5.

Ms.Geeta Jogalekar for BMC respondent no.6.

CORAM : B.H. MARLAPALLE,J

DATED : 14th October 2005

P.C.:

1. Heard Shri Shailesh Shah, the learned

counsel for the appellant plaintiff and Mr.Godbole, the learned counsel for the respondent nos.1 to 5 and Ms.Jogalekar for the respondent no.6 Corporation.

2. This appeal arises from the order passed by the learned Judge of the City Civil Court at Mumbai on 14th June 2005 dismissing the Notice of Motion No.312 of 2005 filed in S.C. Suit no.287 of 2005. In obedience of the order passed by this Court on 6th September 2005, the defendant nos.1 to 5 as well as defendant no.6 have separately filed their affidavits in reply. The defendant nos.1 to 5 have clarified that the suit construction is sanctioned on the balance plot admeasuring 251.56 sq.m which was marked as their own property in the conveyance of the Society registry and the TDR sought to be imposed is about 200 sq.m. and it is vis-a-vis the area in their possession. It has been further clarified that the TDR rights of the plaintiff Society have not been in any way affected by the defendant nos.1 to 5. The affidavit filed by the Corporation shows that the plans were approved on 8th March 2004 whereas the conveyance of the Society to which the defendant nos.1 to 5 are also a party was submitted to the Corporation by the Architect of defendant nos.1 to 5

for the first time in the month of December 2004 and the said affidavit also indicates that the Corporation has treated the new building as the extension of the existing building of the plaintiff society. Mr.Godbole, the learned counsel for the defendant nos.1 to 5 rightly submitted that the said defendants have a right to independently construct a building on the remaining area in their possession and demarcated the conveyance of the society. It appears prima facie that the Corporation has not considered the new structure as an independent structure.

3. The trial Court in the impugned order has observed in paragraph no.14 that the plaintiff Society has given consent on 26.2.2004 or 26.4.2004 and therefore, it cannot take any objection for constructing the building of their remaining portion of the plot in possession of defendant nos.1 to 5. These observations are in ..... in record in as much as the plaintiff has not given any consent or no objection in favour of the defendant nos.1 to 5 till this date. Even the defendants do not dispute this position. It is thus evident that the foundation of the impugned order is factually

incorrect and the trial Court went to the extent of observing that the plaintiff cannot run back from their commitments which they made in the letter dated 26.2.2004 or 26.4.2004 as the case may be. The impugned order is untenable and it would be necessary for the trial Court to consider the Notice of Motion afresh.

4. The appeal therefore succeeds and the same is hereby allowed. The impugned order is quashed and set aside and the Notice of Motion no.312 of 2005 is restored to the file in L.C. Suit no.287 of 2005. The said Notice of Motion is hereby remanded for fresh decision after hearing the parties concerned. On remand, it shall be heard and decided as expeditiously as possible and preferably by 31st December 2005. The construction if undertaken in the mean while shall be subject to the decision in the Notice of Motion.

5. Civil Application does not survive.

B.H. MARLAPALLE, J